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IN THE

Supreme Court of the United States

OCTOBER TERM 1983

NO. _____

NEWPARK SHIPBUILDING & REPAIR, INC.
and
AMERICAN HOME ASSURANCE COMPANY,
Petitioners

v.

JAMES P. ROUNTREE AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Fifth Circuit can refuse to apply this Court's pragmatic finality rule as set forth in *Gillespie v. United States Steel Corporation,* 379 U.S. 148, 13 L.Ed.2d 199, 85 S.Ct. 308 (1964), and *American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 64 L.Ed.2d 284, 100 S.Ct. 1673 (1980), by holding that a Decision and Order of the Benefits Review Board, which was a "final order" in an overwhelming practical sense, is not appealable.

LIST OF PARTIES

Pursuant to Rule 21.1(b) and Rule 28.1, Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties, parent companies, subsidiaries, and affiliates and, additionally, all parties and persons believed to be interested in the outcome of this Petition:

1. James P. Rountree, Respondent
2. Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondent
3. Newpark Shipbuilding & Repair, Inc., Petitioner
4. American Home Assurance Company, Petitioner

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
LIST OF PARTIES	II
TABLE OF AUTHORITIES	III
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	28
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

CASES

	Page
Abbott Laboratories v. Gardner, 387 U.S. 136, 18 L.Ed.2d 681, 87 S.Ct. 1507 (1967)	25, 26, 27
American Export Lines, Inc. v. Alvez, 446 U.S. 274, 64 L.Ed.2d 284, 100 S.Ct. 1673 (1980)	13, 14, 15
Casteel v. St. Louis Shipbuilding & Steel Co., 6 B.R.B.S. 388 (1977)	23
Clefstad v. Perini North River Assocs., 9 B.R.B.S. 217 (1978)	16
Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)	12, 13
Director, Office of Workers' Compensation Programs v. Brodka, 643 F.2d 159 (3d Cir. 1981)	25
Gillespie v. United States Steel Corporation, 379 U.S. 148, 13 L.Ed.2d 199, 85 S.Ct. 308 (1964)	4, 5, 6, 8, 9, 10, 11, 13, 15, 17, 22, 23, 25, 26, 28
Ingalls Shipbuilding Division, Litton Systems, Inc. v. White, 681 F.2d 275 (5th Cir. 1982)	5, 6, 16, 22, 25
Newport News Shipbuilding and Dry Dock Company v. Director, Office of Workers' Compensation Programs, 590 F.2d 1267 (4th Cir. 1978)	25
Offshore Food Service, Inc. v. Benefits Review Board, 524 F.2d 967 (5th Cir. 1975)	16, 17

CASES

	Page
O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951)	26
Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission, ____ U.S.____, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)	25, 27
St. Louis Shipbuilding & Steel Co. v. Casteel, 583 F.2d 876 (8th Cir. 1978)	23, 24, 25
Strachan Shipping Co. v. Davis, 571 F.2d 968 (5th Cir. 1978)	16, 22
Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, 535 F.2d 758 (3d Cir. 1976)	25
United Fruit Company v. Director, Office of Workers' Compensation Programs, 546 F.2d 1224 (5th Cir. 1977)	25
United States v. General Motors Corp., 323 U.S. 373, 89 L.Ed. 311, 65 S.Ct. 357	10

STATUTES

5 U.S.C. §§ 701-706	25
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1257	14
28 U.S.C. § 1292(b)	10, 11
Longshoremen's and Harbor Workers' Compensation Act:	
33 U.S.C. § 910	2, 3
33 U.S.C. § 918(a)	20
33 U.S.C. § 921(c)	2, 3
46 U.S.C. § 688	9

MISCELLANEOUS AUTHORITIES

Rules of the Supreme Court, Rule 17.1(a)	6, 22
Internal Operating Procedures, Court of Appeals for the Fifth Circuit, Manual of Rules, p. 98	8

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JAMES P. ROUNTREE AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Fifth Circuit, sitting en banc, entered in this case on January 23, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit on Rehearing En Banc was reported

at 723 F.2d 399 and is printed in Appendix A to this Petition, p. A-1. The panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at 698 F.2d 743 and is printed in Appendix B to this Petition, p. A-27. The Opinion of the Benefits Review Board is reported at 13 B.R.B.S. 862, and is printed in Appendix C, p. A-60. The Decision and Order of Administrative Law Judge DiNardi is not reported, but is printed as Appendix D, p. A-79.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's appeal was entered on January 23, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act are: Section 10, 33 U.S.C. § 910 and § 21(c), 33 U.S.C.A. § 921(c) and are printed as Appendix E, p. A-120.

STATEMENT OF THE CASE

Respondent Rountree was injured on the job on April 22, 1975, and began receiving compensation benefits promptly under the Act from Petitioners, his employer and its insurance carrier. A dispute arose, however, regarding the average weekly wages upon which Rountree's weekly compensation rate should be based. At an evidentiary hearing before an Administrative Law Judge (hereafter ALJ) on June 4, 1979, the parties presented evidence on the issues of the nature and extent of disability, the appropriate average weekly wage, and the

appropriate awards, if any, of attorney's fees, costs, penalties and interest. The ALJ's Decision and Order of December 26, 1979, held that Rountree's average weekly wage should be calculated pursuant to Section 10(c) of the Act, rather than Section 10(b) as Petitioners contended. 33 U.S.C.A. § 910(b)-(c). The evidence was fully developed by all parties in order that the dollar amount could be calculated once the 10(b) and 10(c) legal issue was determined.

Both Rountree and Petitioners appealed the ALJ's decision on this legal issue to the Benefits Review Board (hereafter BRB) pursuant to Section 21(b) of the Act. 33 U.S.C.A. § 921(b). The BRB (with its Chairman dissenting) resolved the legal issue by affirming the ALJ's determination that Section 10(c) was applicable. However, the BRB held the ALJ had incorrectly determined the dollar amount of Rountree's average weekly wage and needed one small piece of additional evidence to determine properly that dollar amount under Section 10(c) and remanded the case to the ALJ solely for the purpose of recomputing the dollar amount of his average weekly wage solely under Section 10(c).

Petitioners appealed to the Fifth Circuit to obtain a review of the BRB's legal determination that Section 10(c) and not Section 10(b) was applicable to this case. The Respondent Director moved to dismiss the appeal, asserting that the June 10, 1981 Decision and Order of the BRB was not a Final Order because the dollar amount had not been properly fixed and therefore the fully determined 10(b) or 10(c) legal issue was not appealable.

As Rountree was being paid weekly compensation benefits of $240.27 per week as ordered by the ALJ and

the BRB, and as only a legal issue which had been finally determined administratively by the BRB was presented by the appeal, Petitioners opposed the Director's Motion to Dismiss. They did so because the order in this case clearly was appealable based on this Court's mandate in *Gillespie v. United States Steel Corporation,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) (hereafter *Gillespie*), that . . . "the requirement of finality is to be given a 'practical rather than a technical construction'. . . ." 379 U.S., at p. 152. By Order of September 30, 1981, a panel of the Court below directed that the Motion to Dismiss be carried along with the case.

Following oral argument on both the 10(b) or 10(c) legal issue and the issue of finality, on February 22, 1983, a panel of the Fifth Circuit:

1. Denied the Director's Motion to Dismiss the appeal for lack of a final order because the BRB's Decision and Order was a final order under this Court's practical rule of finality as enunciated in *Gillespie.*

2. Reversed the BRB's holding that Rountree's wages were to be computed under Section 10(c) and remanded the case with directions to compute his average weekly wages under Section 10(b), thus sustaining the Petitioners' position on the only legal issue presented on appeal.

The Director's Petition For, and Suggestion of Appropriateness of, Rehearing En Banc, was limited to the panel's holding that the BRB's Decision and Order was not an appealable final order and was granted on May 18, 1983. Following oral argument, the Fifth Circuit, sitting en banc, issued its opinion on January 23, 1984.

The decision of the en banc Court overruled the previous panel opinion on the finality issue,[1] holding

1. That the BRB's order was not final and was not subject to judicial review because ". . . it did not end the litigation on the merits and leave nothing for the trier [ALJ] to do but execute the judgment."[2] 723 F.2d at 406.

2. That this Court's rule of practicality in determining the finality of such an order as set out in *Gillespie* was never to be applied to an order of the BRB under any circumstances, not even "occasionally" when *Gillespie* mandated it. To do so the Court below had to overrule its prior opinion in *Ingalls Shipbuilding Division, Litton Systems, Inc. v. White,* 681 F.2d 275 (1982), which had correctly followed the *Gillespie* rule of practical finality. 723 F.2d, at 407.

REASONS FOR GRANTING THE WRIT

Reason No. 1

The Court below is bound by this Court's *Gillespie* rule of practical finality, and the holding of the Court below that the rule is *never* to be considered (not even "occasionally" even if *Gillespie* compels it) in determining the finality of an order of the BRB "has so far departed from the accepted and usual course of judicial proceedings

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1. With four Judges dissenting, including the Judges most familiar with and experienced in administerng the Court's docket, Chief Judge Clark and former Chief Judge Brown.

2. The BRB's order did in fact end the litigation on the merits on the only issue presented on appeal—whether Section 10(b) or 10(c) was to be used to determine Rountree's average weekly wage in this case.

. . . as to call for an exercise of this Court's power of supervision." [Rule 17.1(a)][3]

The Court below attempted to justify its attempt to overrule *Gillespie* and the establishment of a separate finality rule for the Fifth Circuit only because of

> ". . . the necessary uncertainty . . . that must exist in the administration of a judicially created pragmatic-finality exception, where definable standards for allowing this extra-statutory appeal of right are virtually impossible to formulate." 723 F.2d, at 407.

It was precisely for this very reason—because it was "impossible to devise a formula" to resolve close questions of finality—that this Court reaffirmed its long-standing rule of practical finality in *Gillespie*. It did so unequivocally and concisely:

> Under § 1291 an appeal may be taken from any "final" order of a district court. But as this Court has often pointed out, a decision "final" within the meaning of § 1291 does not necessarily mean the

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3. The word "never" is used advisedly for the Court below made it very clear there were to be no exceptions to its technical role of finality in overruling its decision in Ingalls Shipbuilding Division, Litton Systems, Inc. v. White, 681 F.2d 275 (1982). *Ingalls* had followed the *Gillespie* rule of practical finality and determined a controlling legal issue which had been finally determined by the BRB's order, even though the ALJ had not made fact findings to support it. The court below said:

> "A dismissal of the present petition for review for lack of jurisdiction because the remand order is not final, § 921(c), could possibly rest on leaving *Ingalls* undisturbed, distinguishable and limited to its facts in its pragmatic-finality ruling because of its exceptional circumstances and the central importance of the issues requiring decision. We have decided, however, that *Ingalls* should be overruled, for its value in occasionally permitting reviewable pragmatic finality to Board remand orders is outweighed by its erosion of the values of the finality rule . . ." 723 F.2d, at 407

> last order possible to be made in a case. (Citation omitted). And our cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and *that it is impossible to devise a formula to resolve all marginal cases* coming within what might well be called the "twilight zone" of finality. *Because of this difficulty, this Court has held that the requirement of finality is to be given a "practical rather than a technical construction . . .*" [I]n deciding the question of finality the most important competing considerations are "the inconvenience and costs for piecemeal review on the one hand and the danger of denying justice by delay on the other." (Emphasis added) *Gillespie*, 379 U.S. 148, at 152-53, 13 L.Ed.2d 199, at 203 (1964).[4]

The dissent below concisely stated the extent to which the majority below departed from the accepted and usual course of abiding by, not summarily rejecting, this Court's decisions, thusly:

> The opinion for the Court sacrifices control by this Court over the concept of finality. It will substantially increase the expenditure of administrative and judicial services needlessly in that narrow class of cases such as *Gillespie, Ingalls,* and this case in which the Court can readily perceive that its decision will resolve the fundamental legal issue about which the entire administrative appeal revolves. . . . *We should not abdicate our judicial responsibility* to dispose of pragmatically final orders in an expeditious fashion and with saving to all persons and

4. The Court below recognized that the same rule of finality applied to the BRB's order in this case as is applied to determine whether a "final decision" of a District Court is appealable as required by 28 U.S.C.A. § 1291. 723 F.2d, at 400.

agencies involved. (Emphasis added) 723 F.2d, at 410.

No court of appeals should be permitted to so blatantly overrule a decision of this Court; to so blatantly abdicate its judicial responsibilities simply because it is unwilling to try to apply a rule which this Court recognized was extremely difficult to apply. Relying on *Gillespie's* rule of practical finality, Petitioners sought a judicial resolution of the one controlling legal issue in this case after it had been finally determined by the highest administrative tribunal. Until this Section 10(b) or 10(c) legal issue is finally resolved in this case by the Fifth Circuit or by this Court, the dollar amount of Rountree's average weekly wage (the only thing left to be done on remand) can never be properly fixed by the ALJ. Petitioners and the other parties spent 18 months getting the Fifth Circuit to decide the legal issue, only to have it set aside some 11 months later on a technical lack of finality directly in conflict with this Court's rule of practical finality.[5] Nothing can become final at the administrative level until the legal issue is finally resolved by the courts.

Petitioners respectfully submit that their petition should be granted, and this case summarily disposed of without oral argument with the simple notation: "Reversed. *Gillespie v. United Steel Corporation,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964)." Such an order would reinstate the original decision of the panel in the court below (698 F.2d 743, Appendix B, p. A-27) in which the 10(b) or 10(c) legal issue has already been decided, and end this litigation.

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5. The Fifth Circuit's Internal Operating Procedures provides "the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of the Court." (Manual of Rules, p. 98).

Reason No. 2

This is a classic case for the application of the *Gillespie* rule of practical finality, and the Court below should not be permitted to overrule it and adopt for the Fifth Circuit alone a technical rule of finality as to orders of the BRB only.

Gillespie involved an appeal from an order of the District Court granting the defendant's motion to strike the plaintiff's claims for wrongful death and survival benefits based on Ohio statutes and on the maritime law doctrine of unseaworthiness. This left pending the plaintiff's claim for the death of a seaman under the Jones Act, 46 U.S.C. § 688. In holding that this order granting a motion to strike portions of the plaintiff's pleadings was an appealable final order, this Court articulated three factors to be considered in applying its practicality rule, all of which clearly establish the practical finality of the BRB's order in this case:

1. *Gillespie:* "It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. . . . And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." 379 U.S. at 153.

This case: The inconvenience and cost of the proceedings on remand will not be any greater because the Court of Appeals decided the single 10(b) or 10(c) legal issue but will "certainly be less" if the panel decision on this issue is reinstated as it would be upon this Court's holding the order to be a final one under *Gillespie*. And the time of the Court of Appeals will be less as it will not have to decide the issue at a later date.

2. *Gillespie:* "Furthermore, in *United States v. General Motors Corp.*, 323 U.S. 373, 377, 89 L.Ed. 311, 318, 65 S.Ct. 357, 156 ALR 390, this Court contrary to its usual practice reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the ruling was 'fundamental to the further conduct of the case.' " 379 U.S. at 153.

This case: The ruling of the BRB that 10(c) rather than 10(b) is to be applied is certainly "fundamental to the further conduct of the case." Until this most basic and fundamental issue is determined finally by the Court of Appeals or by this Court, the correct dollar amount of Rountree's average weekly wages cannot be determined. Remand to the ALJ to fix a dollar amount with issue unresolved is a useless exercise in futility.

3. *Gillespie:* "It is true that if the District Judge had certified the case to the Court of Appeals under 28 U.S.C. § 1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress

sought to promote in 1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. § 1291 (1958 ed.). We therefore proceed to consider the correctness of the Court of Appeals' judgment." 379 U.S. at 154.

This case: While certification of the legal issue under 28 U.S.C.A. § 1292(b) is not available to the BRB, if it was, this "appeal unquestionably would have been proper." The 10(b) or 10(c) legal issue is "a controlling question of law as to which there is substantial ground for difference of opinion" and an immediate appeal not only might, but unquestionably would, advance the ultimate termination of this litigation. The litigation can never terminate until this legal issue is decided. Unlike *Gillespie,* by holding the BRB's order in this case not to be appealable, the Court below deliberately chose to frustrate rather than to "properly implement the same policy Congress sought to promote in 1292(b)."

The BRB's decision meets all of these requirements of finality. The controlling 10(b) or 10(c) legal issue has been determined to the point of administrative finality. On remand the ALJ is prohibited from even considering the legal issue as he is ordered to use 10(c). To hold that the BRB's decision is not appealable will result in a denial of justice by unnecessary and expensive delay to the employer and carrier.

In determining that the *Gillespie* practicality rule was extremely limited (as Petitioners and the dissent below both recognize) and could not be used to determine the finality of an Order of the BRB, the Court below relied

on a quotation from a footnote in this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

In doing so, however, the Court below distorts beyond recognition what this Court said in reaffirming the *Gillespie* rule of practical finality, by omitting a most significant statement from the quotation. The quotation relied on by the Court below with the significant statement omitted emphasized reads as follows:

> "Respondents also suggest that the Court's decision in *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 13 L.Ed.2d 199, 85 S.Ct. 308, supports appealability of a class-designation order as a matter of right. We disagree. In *Gillespie*, the Court upheld an exercise of appellate jurisdiction of what it considered a marginally final order that disposed of an unsettled issue of national significance because review of that issue unquestionably 'implemented the same policy Congress sought to promote in § 1292(b),' *Id.* at 154, 13 L.Ed.2d 199, 85 S.Ct. 308, and the arguable finality issue had not been presented to this Court until argument on the merits, thereby insuring that none of the policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue undecided. *In this case, in contrast, respondents sought review of an inherently non-final order that tentatively resolved a question that turns on the facts of the individual case; and, as noted above, the indiscriminate allowance of appeals from such discretionary orders is plainly inconsistent with the policies promoted by § 1292(b).* If *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance." 437 U.S. 463, at 477, 57 L.Ed.2d 351, at 363 n. 30. (Emphasis added).

As this omitted statement reflects, the *Gillespie* practicality rule was not applicable in *Coopers & Lybrand* because the non-final order only "tentatively resolved a question" that turned on the facts. In this case, as in *Gillespie,* the BRB order contained a final administrative determination of the only issue in this case—whether Section 10(b) or 10(c) was applicable.

After *Coopers & Lybrand,* this Court reaffirmed *Gillespie* in *American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 64 L.Ed.2d 284, 100 S.Ct. 1673 (1980) (hereafter *Alvez*).

Relying solely on the *Gillespie* practicality rule, the Court in *Alvez* held a state court order permitting an injured longshoreman's wife to sue for damages for loss of society to be a final appealable order when both (1) the amount of the damages awarded for loss of society and (2) the correctness of the trial court's instructions to the jury were still on appeal in the state courts of New York. This Court did so because the legal issue for decision—whether the wife had a cause of action for loss of society—had been "finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings."[6] 446 U.S. at 278, 64 L.Ed.2d at 289. Precisely

6. The "outcome of future state-court proceedings" to which this Court referred in *Alvez* resulted in the reversal of the state court judgment holding American Export Lines liable for the longshoreman's injury. The entire case was remanded for a new trial on both the liability and damage issues—including the liability (and the amount thereof) for the wife's loss of society. After this reversal, the case was settled after several days into the second trial. Thus, the legal issue in *Alvez* was decided even though there never was a final judgment on which execution could be had as the Court below requires in this case as to either liability or the amount of damages for loss of society or for any other damages.

like *Alvez,* the legal issue in this case has been finally decided by the highest administrative body who can consider it (except as to the dollar amount, as was the case in *Alvez*), and will "survive and require decision" regardless of the dollar amount fixed by the ALJ as Rountree's average weekly wage in future administrative proceedings.[7]

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7. The Court below tries to distinguish the *Alvez* decision on the grounds that the statutory basis for the Supreme Court's review was 28 U.S.C. § 1257, allowing review of State Court judgments, and that the functional purpose of reviewing State Court judgments under Section 1257 was "different and distinguishable . . . from those according finality to District Court judgments under Section 1291 or to Board decisions under 33 U.S.C.A. § 921(c). . . ." 723 F.2d, at 403, see p. A-9. Petitioners cannot fathom the functional difference between review of a *state* ruling regarding a *federal* issue as in *Alvez,* and review of an *administrative* ruling involving a *federal* issue, as is present in this case. The ALJ and the BRB administratively determined the interpretation of Section 10 of the Act; the State Court in *Alvez* determined the existence of a cause of action for loss of society under the maritime law of the United States. In both situations, the issue in dispute was finally decided by the highest court in the appropriate system, state and administrative, to a point of finality that would survive and require a decision regardless of the outcome of future proceedings.

The Court of Appeals also tries to distinguish *Alvez* on the grounds that after Certiorari was granted, the State Court's decision became final for Section 1257 purposes, as the case had proceeded to trial and counsel for American Export Lines advised that the state courts had made a final ruling on the issue of whether the wife had a claim for loss of society. See 446 U.S., at 278, n.5. The further state court proceedings in *Alvez,* however, as noted previously (see Footnote 6), resulted in a reversal of the State Court judgment holding the defendant shipowner responsible for the longshoreman's injury and a remand for new trial. Before the new trial, moreover, the claim was settled. The legal issue in *Alvez,* therefore, despite the assertions of the Court below, never became completely final for Section 1257 purposes. *Alvez* clearly did not involve a State Court decision which would meet the requirement of the Court below in this case that it end the "litigation on the merits and leave nothing further for the trier to do but execute the judgment." 723 F.2d, at 406, see p. A-17.

The technical finality rule adopted by the court below is in direct conflict with Court's decisions in both *Gillespie* and *Alvez*.

Petitioners respectfully submit that their petition should be granted, and this case summarily disposed of without oral argument with the simple notation: "Reversed. *Gillespie v. United Steel Corporation,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964)." Such an order would reinstate the original decision of the panel in the court below (698 F.2d 743) in which the 10(b) or 10(c) legal issue has already been decided, and end this litigation.

Reason No. 3

The *Gillespie* rule of practical finality does that which this Court formulated it to do—it increases judicial and administrative efficiency and avoids denying justice through unnecessary delay. The technical rule of finality adopted by the Court below produces precisely the opposite result.

The wisdom of applying the *Gillespie* rule of practical finality to Orders of the BRB and the tremendous amount of inconvenience, delay, costs, and waste of judicial and administrative time and effort which can occur when the Fifth Circuit's technical approach is taken are very dramatically illustrated by considering the administrative and judicial voyages of two recent cases under the Longshoremen's Act in and out of the Fifth Circuit:

Ingalls[8] The Practical Approach of *Gillespie*	*Strachan*[9] The Technical Approach of the Court below
1. The legal issue involved was whether administrative law judges had the power to approve compromise settlements under the Act. The ALJ held that he had the power to approve such settlements and approved the settlement agreed upon by the parties.	1. The legal issue was whether the claim was time barred. The ALJ held the claim was barred. (Order filed November 25, 1974).
2. Upon appeal by the Director, the BRB agreed with the ALJ's legal conclusion but remanded to the ALJ for reconsideration because the ALJ had not fully treated the BRB's guidelines for approving such settlements as set out in *Clefstad v. Perini North River Assocs.*, 9 B.R.B.S. 217 (1978).	2. On appeal by the claimant, the BRB reversed and remanded the case for a full trial. (Decision issued September 18, 1975).
3. As the employer did not agree that the Director had the right to appeal to the BRB, the employer appealed to the Fifth Circuit on the legal issue of whether the Director had standing to appeal to the BRB. The Director's Motion to Dis-	3. The employer and carrier's appeal to the Fifth Circuit was docketed on November 5, 1975. (No. 75-4017). As the employer had named the BRB as a respondent, pursuant to the Fifth Circuit's decision in *Offshore Food Service, Inc.*

8. Ingalls Shipbuilding Division, Litton Systems, Inc. v. White, 681 F.2d 275 (5th Cir. 1982).

9. Strachan Shipping Co. v. Davis, 571 F.2d 968 (5th Cir. 1978).

miss on the grounds that no appealable final order had been entered was denied by the Motion Panel of the Court below without opinion.

4. After oral argument the Fifth Circuit followed *Gillespie* and found the order of the BRB to be appealable saying in part:

". . . The remaining issues, which involve the standing of the Director and the authority of the ALJ to approve lump-sum settlements, are purely matters of law and are 'final' in that they have been litigated and decided by the Benefits Review Board." 681 F.2d, at p. 279. On the legal issues, the Fifth Circuit held the Director had standing to appeal and the ALJ had no authority under the Act to approve lump-sum settlements. All of the costs, time and inconvenience to the parties, the ALJ, and the BRB in the remand proceedings were avoided.

v. Benefits Review Board, 524 F.2d 967 (5th Cir. 1975), the Clerk of the Court of Appeals removed the BRB as a respondent.

4. The Director filed a motion to Amend and Reform Caption to reflect the Director's status as a Respondent which was granted.

5. The Director's Motion to Dismiss on grounds that the BRB's Order was not an appealable order was

granted without opinion. (Order of Dismissal filed March 17, 1976).

6. Upon remand, after hearing the ALJ held the claim was not time barred and awarded approximately $48,000 in compensation benefits (Order filed October 8, 1976).

7. The employer and carrier filed an appeal with the BRB.

8. The employer and carrier filed a Motion to Stay the payments of compensation with the BRB pending appeal to the BRB, which was denied. (Stay denied October 15, 1976).

9. The employer and carrier appealed again to the Fifth Circuit, seeking a stay of the compensation payments while the appeal was pending before the BRB (No. 76-3909), which was denied.

10. The claimant sought a Supplemental Compensation Order from the Deputy Commissioner declaring the previously awarded compensation payments in default and awarding 20% additional compensation pur-

suant to Section 14(f) of the Act, (Order requested November 23, 1976). The Deputy Commissioner referred the claimant's request for a Supplemental Compensation Order to the Office of Administrative Law Judges for entry of the Order.

11. The Office of Administrative Law Judges remanded the request for a Supplemental Order back to the Deputy Commissioner, because the procedures for referral of such matters to the ALJ had not been fully satisfied. (Section 19(c) of the Act).

12. The Deputy Commissioner entered the Supplemental Compensation Order, ordering the employer and carrier to pay accumulated compensation at that time of $46,619.91. (Order entered December 23, 1976).

13. The employer and carrier appealed the ALJ's remand to the Deputy Commissioner and the Deputy Commissioner's Supplementary Compensation Order to the BRB, which dismissed the appeal on January 31, 1977.

14. The BRB denied a subsequent Motion for Reconsideration on March 2, 1977.

15. The BRB affirmed the ALJ's second Decision and Order (see Item 6 above), holding the claim not time barred and awarding compensation. (Order affirmed March 9, 1977).

16. The employer and carrier again appealed to the Court of Appeals (No. 77-1555), seeking review of the BRB's reversal of the ALJ's first Order (Item 2 above), the BRB's Order dismissing the employer's appeal on the Supplemental Compensation Order (Item 13 above), and the BRB's affirmance of the ALJ's second Order (Item 15 above). The appeal was docketed in the Fifth Circuit on March 16, 1977.

17. The claimant instituted enforcement proceedings in the United States District Court for the Southern District of Alabama (C.A. No. 77-198H), pursuant to Section 18(a), 33 U.S.C. § 918 (a), of the Act on April 5, 1977. The employer and carrier filed a Motion to Dis-

miss the enforcement proceedings in District Court.

18. The Director filed a Motion to Hold Proceedings in Abeyance in the Fifth Circuit on the grounds that the employer and carrier had not paid compensation pursuant to the ALJ's Order, which was denied by the Court of Appeals on May 26, 1977.

19. The Director filed in the Fifth Circuit a Motion for Reconsideration of the Order Denying the Motion to Hold Proceedings in Abeyance, which was denied on July 18, 1977.

20. Upon the third appeal to the Fifth Circuit when the identical time bar issue raised on the first appeal (Item 3 above) was finally heard, the Court of Appeals agreed with the decision by the first ALJ that the claim was time barred (Item 1 above), and remanded the case "to the Benefits Review Board with the instruction to reinstate the ruling of the first administrative law judge denying recovery to the Claimant." 571 F.2d 968 at 975 (April 24, 1978).

It is the quick and efficient four-step voyage to a judicial determination of a controlling issue of law in *Ingalls* which the Court below has decreed shall never happen again in the Fifth Circuit. In overruling *Ingalls* insofar as it applies the *Gillespie* rule of practical finality, the Court below has decreed for all future appeals from orders of the BRB the potential for the 20-step voyage of its *Strachan* case. In so doing, it has mandated that the long, tortuous, wasteful and useless technical approach it enunciated in *Strachan,* which resulted in at least 13 unnecessary legal proceedings over a period in excess of three years, is to be the price the litigants, the ALJ's, the BRB and the district courts have to pay before the Fifth Circuit will condescend to decide a controlling issue of law, which has been fully and finally decided at the administrative level. Such a course may save the Judges of the court below some time and effort for the present, but the price it exacts from the litigants and the administrative tribunals is exorbitant and unwarranted.[10]

The Fifth Circuit's singling out of orders of a single administrative board to which it will not apply *Gillespie,* once again is such a departure from "the accepted and usual course of proceedings, . . . as to call for an exercise of this Court's power of supervision." [Rule 17.1 (a)]

Petitioners again respectfully submit that their petition should be granted, and this case summarily disposed of

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10. Petitioners have spent in excess of $57,000 in attorneys' fees and expenses in an attempt to resolve the 10(b) and 10(c) legal issue. Over $20,000 of this amount was expended after the panel decision in Petitioner's favor. In addition, using § 10(b) to calculate Rountree's average weekly wage, the overpayments of weekly compensation through January 30, 1984, total approximately $30,000.

without oral argument with the simple notation: "Reversed. *Gillespie v. United Steel Corporation,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964)." Such an order would reinstate the original decision of the panel in the court below (698 F.2d 743) in which the 10(b) and 10(c) legal issue has already been decided, and end this litigation.

Reason No. 4

The decision below is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *St. Louis Shipbuilding & Steel Co. v. Casteel,* 583 F.2d 876 (8th Cir. 1978), and the Petition should be granted to resolve that conflict.

Casteel's widow filed a claim for death benefits under the Act. The Administrative Law Judge issued an award of death benefits to the widow and surviving children and calculated the dollar amount to which they were entitled. The BRB affirmed the award of death benefits, but reversed the ALJ's calculation of the dollar amount, and remanded the matter to the ALJ for "a redetermination of the amount of the award" in accordance with the BRB's formula for properly calculating the dollar amount of death benefits. *Casteel v. St. Louis Shipbuilding & Steel Co.,* 6 B.R.B.S. 388, at 395 (1977). The employer and carrier appealed to the Court of Appeals for the Eighth Circuit for a review of the controlling and legal constitutional issues which had been finally determined by the BRB. The Court of Appeals recognized that the BRB's Order was not technically final because the dollar amount of death benefits had not been fixed by the ALJ (just as the dollar amount of the average weekly wage has not been set in this case).

Apparently familiar with the practical rule of finality, the Eighth Circuit held the BRB's Order to be a final and appealable one as to the controlling legal and constitutional issues involved, simply noting in a footnote:

> The decision of the Benefits Review Board reversed the decision of the administrative law judge on the issue of the amount of benefits to be awarded and, supplying the formula to be used in making the correct computation, remanded the case for entry of an appropriate order. Under these circumstances, the order of the Board was final and reviewable in this Court under 33 U.S.C. § 921(d). . . . *St. Louis Shipbuilding & Steel Co. v. Casteel*, 583 F.2d 876, n. 1.

On the issue of finality, this case and *Casteel* are identical in all respects:

1. Both had controlling legal issues which had been finally decided administratively by the BRB.
2. The BRB had remanded both cases to the ALJ solely for the purpose of determining a dollar amount to be paid based on specific instructions as to the law from the BRB.
3. The dollar amount found by the ALJ in each case would have no bearing on the Court's resolution of the controlling legal issues.

The BRB's Order in *Casteel* clearly would not meet the Fifth Circuit's technical rule of finality—something more had to be done than "to execute the judgment," the ALJ had to compute the dollar amount.[11]

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11. The majority of the court below was apparently greatly influenced by what it called "the uniform jurisprudence of this and every other circuit." 723 F.2d at 404. It obviously had to ignore

The Petition should be granted to resolve the direct and irreconcilable conflict between these two decisions of the Fifth and Eighth Circuits.

Reason No. 5

The technical rule of finality of the court below is in direct conflict with this Court's decisions on finality of administrative orders under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, in:

1. *Abbott Laboratories v. Gardner,* 387 U.S. 136 at 149, 18 L.Ed.2d 681, at 692, 87 S.Ct. 1507 (1967).
2. *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission,* ____U.S.____, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

Casteel (and its own *Ingalls* case) to make this statement, but what it even more flagrantly ignored was the fact that none of the cases which it relied on contained orders which could meet the *Gillespie* practical rule of finality. In fact, four of the five cases cited were so obviously non-final orders, they did not have to cite or consider *Gillespie* to any extent:

1. BRB remanded to ALJ to determine whether special second injury fund was liable to employee and to determine the nature or extent of his disability. Director, Office of Workers' Compensation Programs v. Brodka, 643 F.2d 159, 161 (3d Cir. 1981).
2. BRB remanded to the ALJ to determine the degree of the employee's hearing loss and the compensation payable therefor. Newport News Shipbuilding and Dry Dock Company v. Director, Office of Workers' Compensation Programs, 590 F.2d 1267, 1268 (4th Cir. 1978).
3. BRB remanded to ALJ to determine extent of permanent disability. United Fruit Company v. Director, Office of Workers' Compensation Programs, 546 F.2d 1224 (5th Cir. 1977).
4. BRB remanded to ALJ to determine attorneys' fees to be awarded against the special second injury fund. Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, 535 F.2d 758, 76[illegible] (3d Cir. 1976).

There is no question that the Administrative Procedure Act is applicable to adjudications under the Longshoremen's & Harbor Workers' Compensation Act.[12]

That the practicality concept of *Gillespie* is applicable to administrative orders under the Administrative Procedure Act was reaffirmed by this Court when, relying on its own earlier decisions, it said:

> ". . . The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a *pragmatic* way." (Emphasis supplied) *Abbott Laboratories v. Gardner,* 387 U.S. 136 at 149, 18 L.Ed.2d 681, at 692, 87 S.Ct. 1507 (1967).
>
> ". . . that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation . . . (citations omitted) . . . that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. . . ." 387 U.S. at 140-141, 18 L.Ed.2d at 687, 87 S.Ct. 1507.

As recently as April 20, 1983, this Court recognized *Abbott Laboratories* as its leading case on the finality of administrative orders:

> ". . . In *Abbott Laboratories,* which remains our leading discussion of the doctrine, we indicated that the question of ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' *Id.,* at 149, 18 L.Ed.2d 681, 87 S.Ct. 1507 . . ." *Pacific Gas & Elec. v. Energy Res. Comm'n.,* ____U.S.____, 75 L.Ed.2d 752, at 763, 103 S.Ct. 1713.

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12. O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951).

The final agency action in *Abbott Laboratories* was the issuance of an administrative regulation requiring drug manufacturers to label certain drugs in a particular way. There had been no "attempted enforcement of the statute or regulation against" the Plaintiff at the time of this Court's decision and there might never be! Neither a resolution of the legal issue of a violation of the regulation or the penalty to be imposed had been determined administratively. Yet the Court below insists here it is not enough for the legal issue to have been finally determined administratively, a dollar amount also has to be fixed.

While the semantic distinction the Court below made on the grounds that *Abbott Laboratories* and *Pacific Gas* involved the "ripeness doctrine" rather than the *Gillespie* "finality doctrine" may be semantically correct, it is clear both doctrines involve precisely the same practical considerations:

> ". . . the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149.

Whether "ripeness" or "finality" is involved, this Court has mandated that they must be determined in a pragmatic way and the technical way adopted by the court below is directly in conflict with this Court's decisions in *Abbott Laboratories* and *Pacific Gas*. This Petition should be granted to resolve that conflict.

CONCLUSION

Petitioners respectfully submit that their petition should be granted, and this case summarily disposed of without oral argument with the simple notation: "Reversed. *Gillespie v. United Steel Corporation,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964)." Such an order would reinstate the original decision of the panel in the Court below (698 F.2d 743) in which the 10(b) or 10(c) legal issue has already been decided, and end this litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Petition for Writ of Certiorari and of the Appendix have been served upon each of the parties required to be served by depositing them in a United States post office, with first class postage prepaid, addressed to counsel of record and the Solicitor General of the United States at their post office address as follows: Mr. Stephen M. Vaughan, Mandell & Wright, 806 Main Street, Houston, Texas 77002, attorney for Respondent Rountree; Mr. Francis X. Lilly, Mr. Donald S. Shire and Mr. Joshua T. Gillelan, II, U. S. Department of Labor, 200 Constitution Avenue, N.W., Suite N-2620, Washington, D.C. 20210, attorneys for Respondent Director, and the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, on this 19th day of April, 1984.

E. D. Vickery

E. D. VICKERY